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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 31

WYANDOTTE TRANSPORTATION COMPANY, UNION BARGE LINE CORPORATION and CARGILL, INC., et al.,

Petitioners,

versus

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR PETITIONERS.

This brief is submitted by petitioners Wyandotte Transportation Company, Union Barge Line Corporation and Cargill, Inc., et al, in reply to the brief for the United States of America.

ARGUMENT

SECTION 10 OF THE RIVERS & HARBORS ACT (33 U.S.C. 403) DOES NOT APPLY TO THE NEGLIGENT SINKING OF A VESSEL

The Government has taken the position that the provisions of § 10 (33 U.S.C. 403) of the Rivers & Harbors Act to the effect that "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any waters * * *" are broad enough to include

the negligent sinking of a vessel in navigable waters. We have discussed this point in part in our original brief and will not reiterate that discussion herein. The Rivers & Harbors Act of 1899 has been characterized as a "great design" to insure the navigability of the natural waterways. By its terms § 10 prohibits the creation of any obstruction to the navigable capacity of any waters of the United States and provides that it shall not be lawful to build any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures. It is noteworthy that in the "great design" of this legislation no mention is made of the word "craft" or "vessel". These are plain, ordinary, garden-variety English words and are used extensively in other portions of the Statute. Their omission from § 10 could only have been a conscious act on the part of Congress, and is a strong indication of the intent of Congress to deal with the problem of sunken vessels in the Wreck Statute proper (33 U.S.C. 409, 414, and 415) and not in § 10 (33 U.S.C. 403).

Even if we concede, however, that a vessel may be an obstruction under § 10 (Section 403), the Government can gain no solace. § 10 (Section 403) by its terms does not apply to obstructions resulting from a negligent or unintentional act. See, for example, *United States vs. Hall*, 63 Fed. 472 (1894). In common usage "create" imports an intentional rather than a negligent act. This is borne out by the context in which "create" is used in § 10 (Section 403).

It would be ludicrous for Congress to prohibit the negligent creation of an obstruction to navigable waters "not affirmatively authorized by Congress". One cannot conceive of Congress authorizing a negligent obstruction in the first place; and, in the second place, if an obstruc-

tion is negligently created, Congress would never have the opportunity to "authorize" it. This same point was made by the Court of Appeals for the Fourth Circuit in the *United States vs. Moran Towing & Transportation Company*, 374 F. 2d 656 (1967), where the Court said (p. 668):

> "* * * An intentional creation of an obstruction of a channel by the scuttling of a vessel has thus been made referable under § 412 to § 403 and its related provisions for mandatory injunctions, but a negligent sinking is not. This is consistent with the general statutory scheme, which we considered in Part I of this opinion. The kind of deliberately erected structure which § 403 contemplates, must be removed at the expense of the owner when it constituted an unauthorized obstruction of navigable waters, and an injunction is specifically authorized. In contrast, under the Wreck Act, the only expressed consequence of an owner's failure to remove a sunken vessel, if the obstruction was not 'wilfully' created, is to give the United States the right to treat it as abandoned, remove it, and retain the salvage. In this, the statutes draw no distinction between careless and innocent sinkings."

This construction of the statute is in harmony with *United States vs. Perma Paving Company*, 332 F. 2d 754 (CA 2, 1964), and *United States vs. Republic Steel Corporation*, 362 U.S. 482. Although under *Republic Steel* the types of obstruction prohibited by § 10 (Section 403) may not be limited to the types of "structures" referred to in that section; nevertheless, the fact remains that the wharves, piers, dolphins, etc. referred to in § 10 (Section 403) are all planned and intentionally created obstructions. The same is true of the fill involved in *Republic Steel* and the shoal involved in *Perma Paving*—both were intentional. Republic Steel consciously was dumping refuse in the river,

and the fill was a natural and foreseeable result thereof. Perma Paving intended to pile stone on the foreshore, and the creation of a shoal was a natural and foreseeable result of that action. The Government cannot point to any case in the jurisprudence other than the instant one, applying § 10 (Section 403) to a negligent sinking of a vessel.

ABANDONMENT OF A VESSEL TAKES PLACE BY VIRTUE OF THE RIVERS AND HARBORS ACT, AND THIS STATUTE HAS NO CONNECTION WITH THE LIMITATION ACT

The Government at several places in its brief[1] suggests that there is a close relationship between the Limitation of Vessel Owner's Liability Act of 1851 and the Rivers and Harbors Act of 1899. The legislative history of the Rivers and Harbors Act is bereft of any suggestion that this Statute is related to the Limitation Act. The intention of Congress in enacting the Limitation Act was to benefit a vessel owner by affording him, under appropriate circumstances, a means of curtailing the extent of his responsibility with respect to a marine disaster. The Limitation Act thus confers upon a vessel owner the right to limit his liability in respect of claims for personal injury and death and for damage to and loss of property, growing out of a marine casualty, to the value of his interest in the vessel and pending freight, provided the vessel owner is not privy to, and does not have knowledge of, the fault and neglect of his agents giving rise to his liability.

There is, in truth, no connection between the Limitation Act and the Rivers and Harbors Act; they involve different concepts and different purposes. Abandonment

[1] Pages 9, 27, 28, 33, 34, and 35.

of the vessel under the Rivers and Harbors Act is not a condition precedent to institution of limitation proceedings; and it has never been suggested that abandonment of a vessel under the Rivers and Harbors Act results in insulation of a vessel owner from claims for personal injury, death, or property loss and damage, growing out of the casualty which results in the sinking of the vessel. Rather, the extent of the vessel owner's liability, if any, for these claims is determined by the Limitation Act.

On the other hand, the Rivers and Harbors Act relates specifically to responsibility for the cost or expense of marking and of removing a vessel which has accidentally sunk in the navigable waters of the United States and has thus become a matter of public concern. By codifying the principle of abandonment,[2] the Rivers and Harbors Act thus makes provision for the transfer of ownership of a sunken vessel to, and the vesting of title in, the Government; establishes the mechanics of removal by the Government "without liability for any damage to the owners of the same" (See § 19, [Section 414]); and specifies and delineates the extent of the recourse of the Government as against all persons, affording the Government rights against, but limiting them to, the sunken vessel.

The Government apparently seeks to confuse the issue before the Court by making the suggestion, which is without foundation, that a relationship exists between the Limitation Act and the Rivers and Harbors Act.

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[2] Abandonment may be accomplished either voluntarily or involuntarily; a sunken vessel is conclusively presumed to be abandoned after the passage of 30 days. See § 19 (Section 414).

THE RIVERS AND HARBORS ACT HAS PREEMPTED THE FIELD INVOLVING THE REMOVAL OF SUNKEN VESSELS FROM NAVIGABLE WATERS AND THE RECOVERY OF REMOVAL COSTS. THE UNITED STATES HAS NO RIGHTS OR REMEDIES HEREIN ASIDE AND APART FROM THAT STATUTE

The second portion of the Government's brief is devoted to a consideration of alleged non-statutory grounds of liability, with particular reference to the petitioners' obligation to abate the obstructions as public nuisances or pay the costs of abatement. (Resp. Br. pp. 40-48).

The Respondent made the same contention in the Court of Appeals below. That Court, however, found it necessary, in its imposition of *in personam* liability, to stay within the framework and the four corners of the Rivers and Harbors Act. (Rec. 150-165). Also, in *United States v. Republic Steel, supra*, this Court, in order to grant the Government the relief requested, found that the industrial deposits referred to **created an obstruction under the Rivers and Harbors Act.** Aside and apart from the terms of that Statute, the United States could not have prevailed in that case. See 362 U.S. at page 493.

The Rivers and Harbors Act of 1899, described by this Court in *Republic Steel* as having as its "great design" the protection of the navigable capacity of the United States, has preempted that field, the effect of which is to require the national sovereign to look to its own legislation and to that alone for the relief which it seeks. Congress, having reaffirmed its national control over navigable streams by enacting the statute in question, has preempted that field and resort may not be had to non-statutory

remedies, even if they existed. This Court has long recognized that principle. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U.S. 690, 708; *Sanitary District of Chicago v. United States*, 266 U.S. 405, 426; *Second Employers' Liability Cases*, 223 U.S. 1, 53; *Lindgren v. United States*, 281 U.S. 38, 44.

In an attempt to escape the binding effect of the above-mentioned doctrine, the Government contends that a statutory remedy does not take away a previous remedy at common law, unless such an intention is disclosed. (Resp. Br. p. 41). Here, no previous remedy at common law existed, *Willamette Iron Bridge Co. v. Hatch*, 125 U.S. 1, 8, so we are not confronted with statutory and non-statutory remedies going hand in hand.

The Government's reliance upon the English decisions is not justified. (Resp. Br. pp. 41, 42). In *Barraclough v. Brown*, (1897) A.C. 615, 8 Asp. Mar. Cas. 290, 291, 292, the House of Lords stated that at common law there was no liability to pay the expenses of removing an abandoned wreck from a navigable river.

A.

THE RIGHT TO REIMBURSEMENT FOR THE EXPENSE OF ABATING A PUBLIC NUISANCE MUST BE BASED UPON EXPRESS STATUTORY AUTHORITY.

We do not concede that the vessels herein constituted nuisances, subject to abatement. If, however, they are held to be in that category, they are public rather than private nuisances, and the right to abate a public nuisance and to recover the expenses of doing so must be statutorily conferred.

The argument advanced by the Government in connection with this issue (Resp. Br. pp. 45-47) is almost without precedent. Apparently, the only other case in which the Government asserted both a statutory and a common law basis for its claim is *The Texmar*, (*United States v. Bethlehem Steel Corp.*), 319 F. 2d 512 (C.A. 9, 1963), cert. denied 375 U.S. 966, and there the claim was rejected on both grounds. In discussing the alleged common law basis, that Court said (p. 519):

> "The decisions which we have cited constitute an impressive body of authority. There is no decision to the contrary. The Government cites a number of cases in which private proprietors of wharfage or dock space were allowed to recover damages for the obstruction of access to their docks or wharves. Petition of Boat Demand, Inc., 174 F. Supp. 668 (D.C. Mass.); The Irving F. Ross, 8 F. 2d 313 (D.C. Mass.); In re Eastern Transportation Co., 102 F. Supp. 913 (D.C. Md.). It cites English decisions under statutes which expressly provide that the owner of a wreck shall bear the expense of removing it from a channel. These decisions are of no assistance in our task of interpreting the Rivers and Harbors Act, or in determining whether, apart from the Act, there is a common law obligation owing to the United States in a case such as the instant one. In Willamette Iron Bridge Co. v. Hatch, supra, 125 U.S. 1, 8 S. Ct. 811, 31 L. Ed. 629, the Supreme Court held that there was no common law of the United States prohibiting obstructions and nuisances in navigable channels. That decision never having been overruled, it is not surprising that no inferior federal court has discussed the question of obstructions of channels and expenditures made by the United States in removing those obstructions on the assumption that there might be an applicable common law doctrine. Indeed, in the case of United

> States v. Zubik, supra, 295 F. 2d 53 (Cir. 3), the United States did not claim that it had a common law right to reimbursement. United States v. Republic Steel Corporation, supra, 362 U.S. 482, 80 S. Ct. 884, 4 L. Ed. 2d 903, on which the Government relies in our case, was urged upon the court in Zubik, but not as having overruled Willamette, or held that the United States had common law rights in the navigability of channels. What was urged in Zubik was that enough could be found in the statutes to justify a judgment against Zubik, since the Supreme Court had found enough in the statutes to justify a judgment against Republic Steel. We conclude, then, that there has been, and is, no common law basis for a recovery by the Government, and that a judgment in its favor would have to find its basis in the Acts of Congress."

It should also be pointed out that in the instant case the Court below did not rule on this issue.

In the situations where States and municipalities have acted to abate public nuisances, the right to recover expenses has, without exception, been based upon specific provisions contained in the statutes or ordinances authorizing the abatement. The same requirements should and do apply to the national sovereign.

The applicable principle is set forth in the *Village of Palmyra v. G. S. Warren, et al*, 114 Ill. App. 562 (3rd Dist., 1904). In that case a millpond, owned by the defendants, was declared to be a public nuisance by the City Board of Trustees. A notice to fill the pond within ten days was disregarded. The State Board of Health then directed the Village to fill the pond and do whatever was necessary to put it in a sanitary condition. This was done and suit was brought to impose a lien upon the property for the amount

expended in abating the nuisance and for the sale of the property to satisfy the lien.

The Court referred to the state statutes which conferred authority on the part of the cities, villages and towns to declare the existence of nuisances and to take action to abate them. **Those statutes provided for the imposition of fines upon parties who created or suffered nuisances to exist but there was no provision for recovery of the expenses of abatement or the imposing of a lien against the property involved.** In ruling against the plaintiff, the Court said (p. 567):

> "The foregoing constitute the only powers conferred by statutes upon municipalities, relating to the subject of nuisance. It will be observed that no power is therein conferred upon municipalities by either ordinance, resolution or regulation to impose upon any person or property, real or personal, the cost of abating a nuisance existing thereon or arising therefrom. **It follows that there was no legal obligation to pay the expense of abating the nuisance in question, and, therefore, no promise to pay the same could be implied.** * * *" (Emphasis supplied)

In the above case, absence of statutory authority to recover the costs of abatement was fatal to the plaintiff's cause. That principle applies here with equal force. The various aspects of the law relating to public nuisances is discussed by this Court in the leading case of *Georgetown v. Alexandria Coal Company*, 12 Pet. 91.

Also see: *City of Salem v. Eastern Railway Company*, 98 Mass. 431; *City of Nashville v. Weakley*, 95 S.W. (2d) 37, 170 Tenn. 278.

The statute under which the Government acted in

abating the alleged nuisance in the *Wychem* case and the factors which prompted that action are set forth in a letter dated September 25, 1962 from Colonel Warren S. Everett, District Engineer, Vicksburg District, Corps of Engineers, to Wyandotte Transportation Company (Exhibit D. R. 42, 43). The relevant portions are as follows:

> "We received your letter of 21 August 1962 stating that you planned to make a further search and resurvey of the reported sinking area of the Barge Wychem 112 and requesting information about river levels, the speed of the current and bottom contour changes in that area. However, we have delayed answering your letter since subsequent to our advice to you on 26 July 1962, the Secretary of the Army reconsidered the determination as to obstruction and found that it was in fact an obstruction to navigation. **We are, therefore, proceeding under authority of the Secretary of the Army to remove the chlorine Barge Wychem 112 under provisions of Section 19 of the River and Harbor Act of 3 March 1899 (33 U.S.C.A. 414).**
>
> "We have located the sunken Barge Wychem 112 and are proceeding immediately to conduct salvage operations.
>
> "Accordingly, in view of the very grave danger to public health and to navigation that will exist until we remove the chlorine cargo from the Mississippi River, we hereby accept your tender of abandonment of 14 November 1961. The United States will assume full responsibility for the removal and disposal of the Barge Wychem 112 and its cargo. After recovery of the Barge Wychem 112 and/or its cargo, the United States will retain the right of possession and title thereto as salvor." (Emphasis supplied)

Assuming, *arguendo*, that the sunken barge and her

cargo constituted, as Colonel Everett states, "a very grave danger to public health and to navigation", and was, therefore, a public nuisance, there were no provisions in the statute under which Colonel Everett stated he was acting which made the expenses of abatement a charge against those allegedly responsible for creating the nuisance nor authorized the bringing of suit for the collection of such charges.

The Government's right to retain possession of the Barge Wychem 112 and/or its cargo is accorded by the statute upon which he relied. The provisions of that statute do not, however, accord any other means of securing reimbursement, whether the expenses are described as damages, expenses of removal or costs of abatement. This is a far cry from a statute which expressly provides for the abatement of a public nuisance and expressly provides that the person responsible for the nuisance shall pay the costs of abatement. In the absence of such a statute, the right to recover such costs does not exist.

We do not dispute the general doctrine that if a particular individual shall have sustained special damage by reason of the existence of a public nuisance he may maintain a private action for that damage. This Court in *Georgetown v. Alexandria Coal Company, supra,* affirmed that doctrine. These suits are not in that category, and the decisions upon which the Government relies (Resp. Br. p. 46) are not in point.

B.

THE UNITED STATES DOES NOT HAVE A PROPRIETARY INTEREST IN THE MISSISSIPPI RIVER. ITS INTEREST IN MAINTAINING THE NAVIGABILITY OF THAT STREAM DOES NOT ENTITLE IT TO COMPEL THE ABATEMENT OF A NUISANCE OR RECOVER THE COSTS OF ABATEMENT.

The Government asserts that by reason of its two-fold interest in the Mississippi River, regulatory and proprietary, it has an inherent non-statutory right to compel the abatement of the nuisances created by petitioners or to recover the costs of abating them. (Resp. Br. p. 48).

The United States does not own the bed of the Mississippi River. Its interest in that stream is not proprietary and is confined to the control thereof for navigation purposes. 43 U.S.C. § 1311 provides, in substance, that title to and ownership of the lands beneath the navigable waters of the respective States are in the States subject to the authority and rights of the United States respecting navigation, flood control and the production of power.

This Court, in *Port of Seattle v. Oregon & W. R.R. Co.*, 255 U.S. 56, which involved a determination of the ownership of the navigable water within the State of Washington, said (p. 63):

> "The right of the United States in the navigable waters is limited to the control thereof for purposes of navigation. * * *"

Again, in *James v. Dravo Contracting Co.*, 302 U.S. 134, this Court stated (p. 140):

> "The title to the beds of the rivers was in the

> State. (Citing cases). It was subject to the power of Congress to use the lands under the streams 'for any structure which the interest of navigation, in its judgment may require,' * * *:

The interest which the United States had in removing the Wychem 112 and its cargo, and in attempting to compel the removal of the L1 and M65, arose out of its general governmental duty to aid navigation and commerce. See: 12 Op. Atty. Gen. 494, 495.

The alleged expenditure of Federal monies for improvements to the Mississippi River to improve navigation, prevent floods and facilitate commerce does not create a proprietary interest in that stream. A regulatory interest, standing alone, is not sufficient to warrant an action for abatement.

The argument that the United States, as a proprietor, had the same right as a private citizen to seek relief at common law was advanced in *The Texmar*, *supra*, and was rejected there. At 319 F. 2d at page 517, the Court said:

> "The appellees point out that the United States is not the proprietor of navigable channels such as the one obstructed by the appellees' ship; that the Government's interest in the navigability of such channels arises out of the Constitutional power of Congress to regulate interstate and foreign commerce; that the Government's interest, therefore, is a regulatory and not a proprietary interest.
>
> "We think there may be merit in this argument of the appellee. In Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 S. Ct. 811, 31 L. Ed. 629, the Supreme Court, contrary to a prior opinion of the Attorney General, 6 Op. Atty. Gen. 172, 184, held that there was no federal common law prohibiting

> obstructions of navigable waters, because Congress had not asserted an interest in such waters by regulating their use, or otherwise. Congress thereafter enacted statutes pertaining to the obstruction of navigable waters, 26 Stat. 426, 454. Against this background, a court should search the statutes carefully to see if they contain answers to legal questions in this area, and should be hesitant about imposing important legal obligations not expressed or fairly clearly implied in the numerous detailed regulatory statutes enacted by Congress."

The citing of Republic Steel in support of its contention that the United States has the inherent non-statutory right to compel the abatement of nuisances or recover the costs of abatement (Resp. Br. p. 48) is clearly without justification. It is apparent from the briefs filed by the Government in the second *Zubik* (295 F. 2d 53 [C.A. 3, 1961]) and *Texmar* cases and in the Court below that *Republic Steel* was considered by the Attorney General's office not as creating a right to sue for nuisance, but as the basis for extensions of the Rivers and Harbors Act. In other words, the Government was of the view that this Court, having extended the Statute in *Republic Steel* to apply to industrial deposits, should extend it to sunken vessels so as to grant the *in personam* relief sought. The contention that *Republic Steel* stands for the right to sue for nuisance is a new one and is completely unwarranted.

We have examined the other decisions cited by the Respondent on page 48 of its brief. A complete answer to those cases is that even if it be conceded that the United States has an interest in the Mississippi River that interest, as it applies to sunken vessels, is afforded complete protection by the provisions of the Wreck Statute. No other or different protection is authorized or required.

We suggest that the vigor with which the Government has sought to justify the existence of common law and non-statutory remedies reflects a lack of confidence in the soundness of the decision below. That Court, with § 10 (Section 403) of the Rivers and Harbors Act as the basis, granted the relief which the Government sought. If its conclusion is sound, then these bolstering efforts, which occupy approximately one-third of the Government's brief, would seem to be unnecessary.

The Government's reliance upon the English experience and decisions (Resp. Br. pp. 41, 42) is unwarranted. In England, as distinguished from the United States, local harbor boards, canal companies and conservancy authorities, have title to the beds of navigable waters within their boundaries and are self-sustaining corporations. Each is charged with numerous duties performed in this country by both federal and local agencies, such as dredging, supplying aids to navigation, furnishing dock and pier facilities, and fixing charges for docking, etc. See, for example, Port of London, (Consolidation) Act, 1920, 10 and 11 Geo. 5 c. cl. XXIII, and Harbours, Docks and Pier Clauses Act 1847, 10 and 11 Vict. c. 27. One whose vessel sinks within such a harbor or river is made personally liable, by statute, for the removal expenses. He or any tortfeasor may also be liable to the corporation for damages it sustains in its proprietary capacity. The gravamen of the corporation's action for damages is common law negligence. In the instant case, as we have discussed earlier, there is no such proprietary interest.

England has followed the path of local control, and the law of Canada has developed along the same line. *White Star S. S. Co. v. North British & Merc. Ins. Co.*, 48 F. Supp. 808, 814 (D.C. Mich. 1943). American policy, on

the other hand, has favored free navigation maintained at federal expense pursuant to the commerce power in the Constitution. This policy was reflected, for example, in the Rivers and Harbors Appropriation Act of 1882, 22 Stat. 209, which provided that no tolls or operating charges should be levied upon any vessel or other watercraft passing through any canal or other improvement of navigation.

Nowhere is the basic difference between the law of the United States and that of England more pointedly illustrated than in *The Ella*, (1915) p. 111, and *The Manhattan*, 10 F. Supp. 45 (E. D. Pa., 1935), aff'd 85 F. 2d 427 (3rd Cir. 1936), which reached opposite results on similar facts. A good example of the radical difference between English and American wreck law is *The Crystal* (1894) A.C. 508, (cited by the Respondent at pages 23 and 42) in which the House of Lords held that under the general Act of 1847 a Harbor Authority can recover removal expenses from a non-negligent vessel owner.

The principal English case relied upon by the Government is *Dee Conservancy Board v. McConnell*, [1928] 2 K.B. 159 (C.A.). (Resp. Br. pp. 24, 42). The basic difference in the two systems of law makes it and the other English citations clearly distinguishable. In the above case, the Court pointed out that the Conservancy Board was "the owner of the soil with the right to take tolls for navigation and the duty to keep navigation open. * * *" 2 K.B. 166.

The Wreck Statute of the United States contains all of the remedies available to the Government in this litigation. Remedies accorded elsewhere are not relevant.

CONCLUSION

For the reasons set forth in petitioners' original brief and this reply brief it is submitted that the decision of the

Court of Appeals is wrong and the judgment of the District Court in favor of the petitioners should be reinstated.

Respectfully submitted,

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PROOF OF SERVICE

I, George B. Matthews, one of the attorneys for petitioners herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of October ....., 1967, I served copies of the foregoing Brief on respondent United States of America by mailing a printed, bound copy thereof in a duly addressed envelope, with air mail postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

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